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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NADINE SAUBERS, JEANNE BURNS, DENELDA NORWOOD, JENNIFER POPLIN, WENDY PEREL, and JAMES WALDRON, individually and on behalf of all others similarly situated,

Plaintiffs.

VS.

KASHI COMPANY.

Defendant.

CASE NO. 13CV899 JLS (BLM)

**ORDER GRANTING MOTION TO
DISMISS SECOND
CONSOLIDATED AMENDED
CLASS ACTION COMPLAINT**

(ECF No. 32)

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Presently before the Court is Defendant Kashi Company’s (“Kashi”) Motion to Dismiss Second Consolidated Amended Class Action Complaint. (Mot. to Dismiss, ECF No. 32). Also before the Court are Plaintiffs Nadine Saubers, Jeanne Burns, Denelda Norwood, Jennifer Poplin, Wendy Perel, and James Waldron’s (“Plaintiffs”) response in opposition, (Resp. in Opp’n, ECF No. 35), and Kashi’s reply in support. (Reply in Supp., ECF No. 38.) The motion hearing that was scheduled for January 16, 2014 was vacated and the matter taken under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). Having considered the parties’ arguments and the law, the Court **GRANTS** Kashi’s motion and **DISMISSES** this action **WITHOUT PREJUDICE** pursuant to the doctrine of

1 primary jurisdiction.

2 BACKGROUND

3 In this consumer class action, Plaintiffs allege that over 75 different food
 4 products manufactured by Kashi are “misbranded” because they list “evaporated
 5 cane juice,” or variations of that term, as an ingredient on the products’ packaging.
 6 (Am. Compl. ¶¶ 1, 3, ECF No. 28.) Plaintiffs maintain that such labeling is false and
 7 misleading because “evaporated cane juice” is merely ordinary sugar, a fact that
 8 Kashi deliberately conceals in order to appeal to health-conscious consumers
 9 seeking “natural, healthy, and nutritious foods, including [foods with] reduced
 10 sugars [as well as] sugars or sweeteners with reduced glycemic [indices] and
 11 glycemic loads.” (*Id.* at ¶¶ 3, 6.)

12 Based on these allegations, Plaintiffs bring claims against Kashi pursuant to
 13 California’s Sherman Food, Drug, and Cosmetic Law, Cal. Health & Safety Code §§
 14 109875 *et seq.*, Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*,
 15 False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq.*, Consumer Legal
 16 Remedies Act, Cal. Civ. Code §§ 1750, *et seq.*, New Jersey’s Truth-in-Consumer
 17 Contract, Warranty, and Notice Act, N.J.S.A. §§ 56:12-14 to 12-18, Consumer
 18 Fraud Act, N.J.S.A. §§ 56:8–1, and common law claims for unjust enrichment and
 19 restitution. (*Id.* at ¶ 1.) Plaintiffs’ state law claims rely heavily on informal
 20 guidance issued by the U.S. Food and Drug Administration (“FDA”) on October 7,
 21 2009, indicating that “evaporated cane juice” is not the common or usual name of
 22 any sweetener and that the use of this phrase in food labeling is deceptive and
 23 misleading. (*Id.* at ¶¶ 3, 42–44, 58–62, 66–69, 79.) Plaintiffs’ amended pleading
 24 also references warning letters issued by the FDA in recent years to various food
 25 manufacturers, ostensibly reiterating the FDA’s view that the term “evaporated cane
 26 juice” is improper and that its use in food labeling to refer to sweeteners derived
 27 from sugar cane syrup constitutes “misbranding” in violation of existing FDA
 28 regulations. (*Id.* at ¶ 43.)

1 On March 5, 2014, the FDA published a notice in the Federal Register
2 inviting a new round of comments regarding the October 7, 2009 draft guidance.
3 *See Draft Guidance for Industry on Ingredients Declared as Evaporated Cane Juice;*
4 *Reopening of Comment Period; Request for Comments, Data, and Information*, 79
5 *Fed. Reg.* 12507 (Mar. 5, 2014). In the notice, the FDA states that it has “not
6 reached a final decision on the common or usual name for [sweeteners derived from
7 sugar cane syrup] and [that it is] reopening the comment period to request further
8 comments, data, and information about the basic nature and characterizing properties
9 of the ingredient sometimes declared as ‘evaporated cane juice,’ how this ingredient
10 is produced, and how it compares with other sweeteners.” *Id.*

11 Kashi now moves to dismiss or stay Plaintiffs' claims pursuant to the doctrine
12 of primary jurisdiction, among other grounds, arguing that Plaintiffs should not be
13 allowed to proceed with their suit until the FDA has finalized its position regarding
14 the common or usual name for the sweetener often referred to as "evaporated cane
15 juice." (Mot. to Dismiss, ECF No. 32.) As the Court ultimately agrees that the
16 doctrine of primary jurisdiction counsels dismissal of all of Plaintiffs' claims
17 without prejudice at this time, the Court does not address the numerous other
18 arguments raised by Kashi's motion.

LEGAL STANDARD

20 “The primary jurisdiction doctrine allows courts to stay proceedings or to
21 dismiss a complaint without prejudice pending the resolution of an issue within the
22 special competence of an administrative agency.” *Clark v. Time Warner Cable*, 523
23 F.3d 1110, 1114 (9th Cir. 2008). “[T]he doctrine is a ‘prudential’ one, under which
24 a court determines that an otherwise cognizable claim implicates technical and
25 policy questions that should be addressed in the first instance by the agency with
26 regulatory authority over the relevant industry rather than by the judicial branch.”
27 *Id.* (citing *Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775, 780
28 (9th Cir. 2002)). The doctrine principally applies where there is “(1) a need to

1 resolve an issue that (2) has been placed by Congress within the jurisdiction of an
 2 administrative body having regulatory authority (3) pursuant to a statute that
 3 subjects an industry or activity to a comprehensive regulatory authority that (4)
 4 requires expertise or uniformity in administration.” *Id.* (citing *Syntek*, 307 F.3d at
 5 781). Primary jurisdiction may be invoked when an agency is addressing an issue
 6 through formal rule-making procedures, as well as through adjudicative procedures.
 7 *Swearingen v. Santa Cruz Natural, Inc.*, Case No. 13-04291 SI, 2014 WL 1339775
 8 at *2 (N.D. Cal. Apr. 2, 2014) (citation omitted).

9 DISCUSSION

10 In its motion, Kashi argues that Plaintiffs’ claims should be dismissed under
 11 the primary jurisdiction doctrine because the FDA is the administrative agency
 12 charged with regulating the content of food labels and the FDA’s October 7, 2009
 13 draft guidance regarding the use of the term “evaporated cane juice” to describe
 14 sugar cane-based sweeteners is merely preliminary, non-binding, and subject to
 15 further review by the agency. (Mot. to Dismiss 22–24, ECF No. 32.) In its
 16 supplemental filings, Kashi calls specific attention to the FDA’s March 5, 2014
 17 notice in the Federal Register, emphasizing that the notice solicits a new round of
 18 comments regarding the draft guidance on “evaporated cane juice” and indicates that
 19 the agency intends to revise the guidance, if appropriate, and then issue it in final
 20 form. (See Notice of Suppl. Authority in Supp. of Def.’s Mot. to Dismiss, ECF No.
 21 46; Notice of Suppl. Authority in Supp. of Def’s Mot. to Dismiss, ECF No. 50.)

22 Plaintiffs deny, however, that the FDA’s solicitation of additional comments
 23 regarding the October 7, 2009 draft guidance affects their claims. (See Pl.’s Resp. to
 24 Kashi’s Notice of Suppl. Authority 3, ECF No. 47.) According to Plaintiffs, the
 25 FDA’s position that the term “evaporated cane juice” should not be used to describe
 26 sugar cane-based sweeteners has long been settled, as evidenced by the agency’s
 27 willingness to leave the draft guidance unchanged for over 4 years and to issue
 28 numerous warning letters consistent with that perspective. (*Id.*)

1 The Court agrees with Kashi that the primary jurisdiction doctrine counsels
 2 dismissal of Plaintiffs' claims at this time. To begin with, “[f]ood labeling is within
 3 the special competence of the FDA.” *Swearingen*, 2014 WL 1339775 at *2 (citing
 4 *Morgan v. Wallaby Yogurt Co., Inc.*, 13-CV-00296-WHO, 2013 WL 5514563 at *4
 5 (N.D. Cal. Oct. 4, 2013)). “Congress vested the FDA with comprehensive
 6 regulatory authority” over the “proper declaration of ingredients on food labels.”
 7 *Id.* (citing *Reese v. Odwalla, Inc.*, 13-CV-00947-YGR, 2014 WL 1244940 at *4
 8 (N.D. Cal. Mar. 25, 2014)).

9 Moreover, in this action, Plaintiffs' claims rely heavily, if not entirely, on the
 10 premise that the FDA has concluded that “evaporated cane juice” is not the common
 11 or usual name for any sweetener. Plaintiffs' claims each invoke the FDA's informal
 12 guidance to support their contention that the Kashi products identified in the
 13 amended pleading are misbranded and in violation of the FDA's food labeling
 14 requirements. (See Am. Compl. at ¶¶ 3, 42–44, 58–62, 66–69, 79.) Consequently,
 15 the FDA's articulation of its considered view on this matter will undoubtedly affect
 16 issues being litigated in this action. Because the FDA has been actively revisiting its
 17 draft guidance since at least March 5, 2014—indicating that the agency's expert
 18 opinion is still being developed—application of the primary jurisdiction doctrine is
 19 favored. See *Swearingen*, 2014 WL 1339775 at *3 (“[C]ourts find it particularly
 20 appropriate to defer to an agency when, as is true here, the agency is in the process
 21 of making a determination on a key issue in the litigation.”); *Reese*, 2014 WL
 22 1244940 at *5 (“In light of the fact that [the] FDA has revived its review of the
 23 [“evaporated cane juice”] issue, the Court finds that the FDA's position on the
 24 lawfulness of the use of that term is not only . . . ‘not settled,’ it is also under active
 25 consideration by the FDA. Any final pronouncement by the FDA in connection with
 26 that process almost certainly would have an effect on the issues in litigation here.”).

27 Finally, a determination as to the propriety of using the term “evaporated cane
 28 juice” in food labeling involves highly technical considerations, such as how

1 evaporated cane juice is produced, the differences between evaporated cane juice
 2 and other sweeteners, and the ingredient's characterizing properties. *See* Reopening
 3 of Comment Period, 79 Fed. Reg. at 12507. "Resolution of these issues requires the
 4 expertise of the FDA." *Swearingen*, 2014 WL 1339775 at *3. Allowing the FDA to
 5 resolve this matter in the first instance would permit the Court to benefit from the
 6 agency's technical expertise and would also provide for uniformity in administration
 7 of the agency's food labeling requirements. *Id.* at *4 ("[A]pplying the doctrine of
 8 primary jurisdiction allows the Court to benefit from the FDA's expertise on food
 9 labeling and will ensure uniformity in administration of the regulations.").

10 Plaintiffs argue that dismissal would be improper and prejudicial on primary
 11 jurisdiction grounds because the FDA has not indicated the time frame within which
 12 it intends to complete its revisions of the October 7, 2009 draft guidance. (*See* Pl.'s
 13 Notice of Suppl. Authority, ECF No. 51 (citing *Gustavson v. Mars, Inc.*, No. 13-cv-
 14 04537, 2014 WL 2604774 at *10 (N.D. Cal. Jun. 10, 2014)).) Plaintiffs' argument
 15 lacks merit, however, because, unlike the FDA's vague statements regarding a
 16 possible review of general nutrition labeling requirements that were discussed in
 17 *Gustavson*, the FDA's March 5, 2014 notice in the Federal Register indicates that
 18 the agency is specifically reconsidering whether "evaporated cane juice" is a
 19 common or usual name for sweeteners derived from sugar cane syrup and that it has
 20 "not reached a final decision" on the question—the very issue at stake in this
 21 litigation. The March 5, 2014 notice also provides that comments from interested
 22 parties will be accepted until May 5, 2014 and that "[a]fter reviewing the comments
 23 received, [the agency] intend[s] to revise the draft guidance, if appropriate, and issue
 24 it in final form, in accordance with the FDA's good guidance practice regulations in
 25 21 C.F.R. 10.115." Reopening of Comment Period, 79 Fed. Reg. at 12508. Thus, it
 26 is clear from the agency's recent notice that there is "an active and ongoing
 27 regulatory process" involving the specific issues raised in this litigation, such that
 28 the court's reasoning in *Gustavson* is inapplicable here. *Gustavson*, 2014 WL

1 2604774 at *10.

2 Plaintiffs also argue that the U.S. Supreme Court's recent decision in *POM*
 3 *Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2231 (2014) holds that courts
 4 need not defer to the FDA's expertise in suits over deceptive or misleading food
 5 labeling. Plaintiffs reliance on this case is inapposite, however, because *POM*
 6 *Wonderful* makes no mention of the primary jurisdiction doctrine and stands
 7 principally for the proposition that Lanham Act unfair competition claims brought
 8 by a competitor are not *precluded* by the regulatory scheme of the federal Food,
 9 Drug, and Cosmetic Act. 134 S. Ct. at 2241. Because dismissal on the basis of
 10 primary jurisdiction is without prejudice and does not necessarily preclude any
 11 claims brought by a plaintiff, *POM Wonderful*'s reasoning does not support
 12 Plaintiffs.

13 Accordingly, the Court finds that Plaintiffs' arguments are without merit and
 14 that the primary jurisdiction doctrine counsels dismissal without prejudice of all of
 15 Plaintiffs' claims at this time. In reaching this conclusion, the Court concurs with
 16 the majority of district courts within the Ninth Circuit that have considered this
 17 question. *See, e.g., Gitson v. Clover Stornetta Farms*, No. C-13-01517 (EDL),
 18 2014 WL 2638203, at *8 (N.D. Cal. Jun. 9, 2014); *Swearingen v. Late July Snacks*
 19 *LLC*, No. C-13-4324 EMC, 2014 WL 2215878, at *3 (N.D. Cal. May 29, 2014);
 20 *Swearingen v. Yucatan Foods, L.P.*, No. C 13-3544 RS, 2014 WL 2115790, at *2
 21 (N.D. Cal. May 20, 2014); *Avila v. Redwood Hill Farm & Creamery, Inc.*, Case No.
 22 5:13-CV-00335-EJD, 2014 WL 2090045, at *3 (N.D. Cal. May 19, 2014);
 23 *Swearingen v. Attune Foods, Inc.*, Case No. C 13-4541 SBA, 2014 WI 2094016, at
 24 *3 (N.D. Cal. May 19, 2014); *Figy v. Lifeway Foods, Inc.*, Case No.
 25 13-cv-04828-TEH, 2014 WL 1779251, at *3-4 (N.D. Cal. May 5, 2014); *Figy v.*
 26 *Amy's Kitchen, Inc.*, No. C 13-03816-SI, 2014 WL 1379915, at *3 (N.D. Cal. Apr.
 27 9, 2014). The Court **GRANTS** Kashi's motion to dismiss on this basis.

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CONCLUSION

2 For the reasons stated above, the Court **GRANTS** Kashi's motion to dismiss.
3 The dismissal is **WITHOUT PREJUDICE** to Plaintiffs filing an amended pleading
4 after the FDA has released its final guidance regarding the common or usual name
5 for the sweetener often referred to as "evaporated cane juice."

IT IS SO ORDERED.

8 | DATED: August 11, 2014

Janis L. Sammartino
Honorable Janis L. Sammartino
United States District Judge